STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

YASSAH KIZEKAI	)	
	)	
VS.	)	W.C.C. 00-07427
	)	
HERITAGE HILLS NURSING HOME	)	

DECISION OF THE APPELLATE DIVISION

CONNOR, J. This matter came on to be heard before this appellate panel on the employer's appeal from the decree of the trial judge which ordered the payment of weekly benefits as a result of a return of incapacity. After review of the record and consideration of the arguments of the parties, we deny the employer's appeal and affirm the findings and orders of the trial court.

The trial judge heard this matter as an employee's petition to review alleging a return of incapacity from August 24, 2001 and continuing. The document that initially established liability in this matter was a memorandum of agreement that set forth an injury of May 12, 1997 described as a lumbosacral sprain. A decree entered in W.C.C. No. 97-05835 discontinued the employee's benefits effective October 15, 1997. A second decree entered in W.C.C. No. 99-01181 reinstated the employee's benefits as a result of surgery and paid the

employee for total disability from August 27, 1998 through December 31, 1998, and partial disability from January 1, 1999 through May 5, 1999.

At the conclusion of the trial of this matter, the trial judge entered a decree and found that the petitioner/employee had proven by a fair preponderance of the credible evidence that she suffered a return to partial incapacity from August 24, 2001 and continuing. The decree ordered the employer to pay the employee workers' compensation benefits for partial disability from August 24, 2001 and continuing.

From this decree, the employer filed a timely appeal. A review of the evidence is necessary at this time.

The employee testified that she was injured on May 12, 1997 while working as a nurse's aide for the employer. She stated that she received workers' compensation benefits until October 1997. She began receiving workers' compensation benefits again when she had surgery to her back in August 1998. She received those benefits until March 2000, although pursuant to the decree entered in this matter, payments were to be made to her only through May 1999.

The employee stated that since March 2000 she has been treating with doctors for low back pain. She stated that in the year 2000 she saw Dr. Gus Stratton on two (2) occasions. She saw him in May 2000 and was referred for an MRI which was performed at Rhode Island Hospital. She saw Dr. Stratton one (1) more time following the MRI, but did not return to see him because she was not comfortable with him. She then began treating at the Neurology Clinic at Rhode

Island Hospital. She could not recall the names of the doctors with whom she treated, but she does recall receiving pain medication from various doctors. She stated that she also treated with several doctors at the Orthopedic Clinic at Rhode Island Hospital in 2000 and 2001. She also underwent a course of physical therapy.

In September 2001, she began treating with Dr. Kathryn Mehegan at the Rhode Island Hospital Medical Clinic. As of the date of her testimony, she continued to treat with Dr. Mehegan. Dr. Mehegan referred her to a pain clinic, and at the time of her testimony she had had a cortisone injection at the pain clinic.

The employee testified that in September or October of 2000 or 2001, she attempted to return to work. She stated that she began working at Lifespan through an employment agency. This work involved reviewing files that were in boxes or in file cabinets. She performed this work for approximately five (5) weeks. She stated that although she was sometimes required to lift boxes, she refused to do that portion of the job because it bothered her back to perform any lifting. The employee left this job after five (5) weeks due to pain in her back.

The employee stated that she continues to have pain in her back and in her legs on a daily basis. She stated that she cannot do anything physical. The employee testified that in March 2001, she was involved in a motor vehicle accident wherein her husband was driving and she was a passenger. Following the accident, she was treated for some low back pain, but she primarily treated

for neck pain with Dr. Norbert Fleisig. She stated that her low back was hurting her before the accident, and she had a temporary exacerbation of back pain which resolved quickly.

On cross-examination, the employee stated that when she returned to work at Lifespan she worked for approximately five (5) weeks in the year 2000 or 2001, and during that time her back was hurting her. She described the back pain that she experienced with this new job as the same as the back pain that she had at the time of her injury. She stated that she did not reinjure herself while working for Lifespan. She described her job as working in the billing department getting records regarding benefits for patients. She stated that she has not tried to find work since her job at Lifespan because of the pain in her back.

The employee presented the transcript of the deposition of Kathryn Mehegan, M.D. The doctor testified that she is practicing medicine under a temporary license as a general resident in internal medicine at Rhode Island Hospital. At the time of her deposition, she had been practicing general medicine for six (6) months. She saw the employee as a patient at the medical clinic at the hospital. At the time of her deposition, she had seen her four (4) times since August 24, 2001.

At the first visit, the employee complained to the doctor of back pain and migraine headaches. The back pain was in her lower back. The employee gave a history of an injury at work four (4) years prior and of a subsequent laminectomy in August 1998. In the course of her examination, the doctor noted muscle

weakness in the employee's hip and leg. The doctor also noted a lack of a reflex in her lower extremity called hyporeflexia, which accompanies lower extremity weakness. The doctor recommended an MRI and placed the employee on several medications. She also talked about having the employee undergo a steroid injection into the lower back to help alleviate her symptoms. The doctor understood that the employee worked as a certified nursing assistant. It was her opinion that the employee was disabled from that type of work. She offered that opinion to a reasonable degree of medical certainty. The doctor related the employee's problems to the injury she suffered in 1999, as described by the employee.

Dr. Mehegan saw the employee again on September 20, 2001. The employee continued to complain of back and leg pain. The doctor noted that the employee had attempted to return to work but was unable to do so because of back pain. On examination, the doctor noted bilateral muscle weakness and tenderness in the right lower back with straight leg raising. She also noted tenderness on palpation in the right paralumbar area. The doctor continued the employee on medication and ordered her to be referred to a pain clinic to consider epidural steroid injection. The doctor felt that the employee was unable to work.

Dr. Mehegan reviewed an MRI which showed degenerative changes at L4-5 and L5-S1 and some mild enhancement of the scar tissue in the surrounding area. The clinical significance of the MRI, according to Dr. Mehegan, was that it

reassured her that an acute nerve compression was not causing the employee's symptoms. The doctor saw the employee again on November 16, 2001 and she continued the employee on her course of treatment. Dr. Mehegan last saw the employee on January 11, 2002. During that visit, the employee was complaining of side effects from the increased dose of Elavil. The doctor stated she did not conduct an examination on the employee's lower back on that date. The employee was scheduled to see the doctor again for follow-up in approximately three (3) months.

In addition to her examination of the employee, Dr. Mehegan reviewed medical records concerning the employee's prior treatment, and she also reviewed a transcript of the deposition of Dr. Curtis Doberstein. She stated that a review of those records did not change any of the opinions that she offered in her deposition.

During cross-examination, Dr. Mehegan acknowledged that she was not informed by the employee of the March 2001 car accident; however, during the course of her deposition she did review the report of Dr. Fleisig concerning the employee's treatment following the motor vehicle accident. She stated that such reports are customarily relied upon by her in determining the course of treatment for her patients. She stated that she did not review anything in Dr. Fleisig's reports that indicated that the employee was complaining of low back pain. The doctor also reviewed the emergency room report regarding the employee's treatment following the March 2001 motor vehicle accident. As part of that

report, the doctor read the diagnosis of the attending physician at the emergency room as being motor vehicle accident/neck sprain or strain.

At the conclusion of the presentation of evidence in this matter, the trial judge found that there was no medical evidence to contradict the opinions provided by Dr. Mehegan. The trial judge was satisfied that the employee preponderated in showing that she was unable to perform her regular job as a certified nurse's assistant. Additionally, the trial judge found that it had not been shown that the employee, who was forty-six (46) years old at the time of her testimony, had voluntarily retired or otherwise withdrawn herself from the work force.

Pursuant to R.I.G.L. § 28-35-28(b), the appellate panel is charged with the initial responsibility to review the entire record to determine whether the decision and decree properly respond to the merits of the controversy. The role of the Appellate Division in reviewing factual matters is, however, sharply circumscribed. Rhode Island General Laws § 28-35-28(b) states:

> "The findings of the trial judge on factual matters are final unless an appellate panel finds them to be clearly erroneous."

The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Such review, however, is limited to the record made at the trial level. Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

Cognizant of this legal duty imposed upon us, we have reviewed and examined the entire record and find no merit to the reasons of appeal filed by the employer, and we, therefore, affirm the trial judge's decision.

The employer filed two (2) reasons of appeal. First, the employer argues that the trial judge erred in finding that the employee's absence from the work force prior to her return of incapacity was not voluntary or due to an unwillingness to work. We disagree. A review of the record indicates that the employee testified that she in fact attempted to return to work for a five (5) week period in September and October 2000 or 2001, at which time she was employed as a file clerk for Lifespan. The employee testified that she stopped working because she had pain in her back and was unable to continue to perform the activities required of her job. She further testified that she has not looked for work, even light duty work, anywhere because she continues to have pain in her back and legs. This testimony was uncontradicted.

A review of Dr. Mehegan's deposition indicates that the employee reported to Dr. Mehegan that she in fact attempted to return to work in September and October 2000 or 2001 but was unable to continue to perform the requirements of her job due to continued pain in her back. It was Dr. Mehegan's understanding that the employee worked at this job for five (5) to six (6) weeks and then discontinued working due to back pain.

The medical evidence indicates that the employee treated consistently for problems with her back from 2000 through January 2002, and was expected to

continue to treat for her back pain with Dr. Mehegan. The employee had an appointment scheduled with Dr. Mehegan subsequent to the doctor's deposition. It was Dr. Mehegan's opinion based on the history, the diagnostic studies, the medical records she reviewed, and her examination of the employee, that the employee's disability and complaints of back pain were directly attributable to the injury she suffered at work on May 12, 1997.

Our Supreme Court has held that:

> "...when an employee files a petition for benefits arising from a recurrence, and when that employee has not worked for the requisite period as set forth in § 28-33-20.1, the employee bears the burden of establishing that his or her absence from the work force was not voluntary; that is, '[t]he hiatus in [claimant's] actual employment was due not to his [or her] retirement or to his [or her] unwillingness to work,' but instead was due to some non-volitional cause, such as an inability to work as a result of the original injury or occupational disease, or from the employer's refusal to allow the employee to return to work or an inability to obtain employment after a reasonable opportunity to do so."

Perlman v. Philip Wolfe, Haberdasher, 729 A.2d 673, 676 (R.I. 1999) (quoting Lambert v. Stanley Bostitch, Inc., 723 A.2d 777, 782 (R.I. 1999)).

In applying the standard set forth in Perlman to the case at bar, it is clear from the evidence presented at the trial level that the trial judge did not err in finding that the employee did not voluntarily remove herself from the work force or voluntarily retire. As set forth above, there is substantial evidence in the record to support the trial judge's determination and conclusion that the employee remained out of the work force due to pain in her back which was the

result of the work-related injury. Consequently, the employer's first reason of appeal is denied and dismissed.

Next, the employer argues that the trial judge erred in overlooking and/or misconceiving the medical evidence of Dr. Mehegan relating to opinions of causal relationship and disability. We disagree.

A careful review of Dr. Mehegan's deposition indicates that she saw the employee on four (4) occasions; on three (3) of which she conducted a physical examination. A review of her testimony indicates that she noted objective as well as subjective findings during the course of her several examinations. Dr. Mehegan also testified that she reviewed medical records regarding the employee's past medical treatment, as well as a transcript of a deposition of Dr. Curtis Doberstein. She also received a history from the employee regarding the nature of her injury and the course of her treatment following same.

Dr. Mehegan did testify that she was not made aware until the deposition that the employee was involved in a motor vehicle accident in March 2001. She did state that this could change her opinion regarding causal relationship; however, she did not say that it would change her opinion regarding causal relationship, nor did she change her opinion regarding causal relationship. During the course of redirect examination of the doctor, she was provided with an emergency room report, as well as reports from Dr. Norbert Fleisig regarding the employee's treatment following the motor vehicle accident. A review of those reports did not change the opinions that she offered during direct examination.

This tribunal is of the opinion that the trial court's reliance on those opinions offered by Dr. Mehegan was appropriate and is supported by her testimony during the course of her deposition. Dr. Mehegan did not change her opinion with regard to disability or causation at any time during the course of her deposition. We feel that the trial judge was justified in his reliance on Dr. Mehegan's testimony in granting the employee's petition for a return to incapacity effective August 24, 2001 and continuing. Therefore, the employer's second reason of appeal is denied and dismissed.

Based on the foregoing, we, therefore, affirm the decision and decree of the trial judge and deny and dismiss the employer's appeal in this matter. An attorney's fee in the amount of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars is awarded to Ronald L. Bonin, Esq., for his successful defense of this appeal.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Olsson and Sowa, JJ. concur.

ENTER:

_____
Olsson, J.

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Sowa, J.

_____
Connor, J.

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PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

YASSAH KIZEKAI)
)
VS.) W.C.C. 00-07427
)
HERITAGE HILLS NURSING HOME)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employer, and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on October 17, 2002 be, and they hereby are, affirmed.

The employer shall pay to Ronald L. Bonin, Esq., an attorney's fee in the sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars for his successful defense of this appeal.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies were mailed to Ronald L. Bonin, Esq., and Christopher Fiore, Esq., on

_____